IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : B : NEW DELHI

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA No.2054/Del/2016
Assessment Year: 2011-12

Heidelberg Cement India Ltd., 9th Floor, Tower-C, Infinity Towers, DLF Cyber City, Gurgaon. PAN: AABCM2359J	Vs	DCIT, Circle-2, 3rd Floor, Vanijya Nikunj, HSIIDC Building, Udyog Vihar, Ph. V, Near Shankar Chowk, NH-8, Gurgaon.
(Appellant)		(Respondent)

Assessee by	:	Shri Deepak Chopra, Advocate & Sh. Harpreet Singh Ajmani, Advocate
Revenue by	:	Ms Ashima Neb, Sr. DR
Date of Hearing	:	28.08.2019
Date of Pronouncement	:	31.10.2019

ORDER

PER R.K. PANDA, AM:

This appeal filed by the assessee is directed against the order dated 1st February, 2016 of the CIT(A)-1, Gurgaon, relating to assessment year 2011-12.

2. Grounds of appeal No. 1 and 1.1 raised by the read as under:-

> "1. The Ld. CIT(A) has erred on facts and in law, in confirming the disallowance made by the Ld. AO, amounting to INR 87,12,690/-, on account of additional depreciation claimed by the Appellant on new Plant and Machinery in accordance with the provisions of Section 32(i)(iia) of the Act.

1.1 The Ld. CIT(A) / Ld. AO erred on facts and in law, in considering only the nomenclature of the assets to hold the disallowance, without appreciating the detailed nature and use of the assets."

3. Facts of the case, in brief, are that the assessee is a company engaged in manufacturing high quality cement. It filed its return of income on 30.11.2011 declaring the total income of Rs.50,95,00,880/-. During the course of assessment proceedings, the Assessing Officer noted that the assessee has claimed additional depreciation to the tune of Rs.3,03,91,277/-. From the various details filed by the assessee, the Assessing Officer noted that there are several items on which additional depreciation has been claimed that are not required for manufacturing activity or are mere replacements of plant & machinery earlier in use. He, therefore, asked the assessee to justify the same and to explain as to why the claim of additional depreciation on the various items as per para 1.1 of his order be not disallowed. The assessee, in response to the said notice submitted that all the items as pointed out by the Assessing Officer are integral part of the Plant & machinery which are essential for the smooth operations of the plant & machinery. It was explained that such items are not capable of being used in isolation since the application of such items is essentially based on the functionality of the plant & machinery. Therefore, they form an integral part of the plant and are to be treated as plant for the purpose of allowing additional depreciation.

4. However, the Assessing Officer was not satisfied with the argument advanced by the assessee. He referred to the provisions of section 32(1)(iia) of the Act and observed that the said section clearly allows additional depreciation for acquisition and installation of new plant & machinery and not for replacement of parts of plant & machinery in existence/use. He accordingly disallowed an amount of Rs.87,12,690/- being excess claim of additional depreciation made by the assessee.

5. In appeal, the ld.CIT(A) upheld the action of the Assessing Officer. While holding so, he observed that the large amount of claim is related to rope for the Ropeway and coal shed. The details filed by the assessee shows that the expenses are for replacement of burner, motor, waste gas fan, primary air fans, etc. According to him, these are not new machinery which has been purchased by the assessee, but, these are in the nature of repair and maintenance of the existing machinery. Relying on the decision of the Hon'ble Delhi High Court in the case of *Anurena Tristar vs. ITO (2011) 330 ITR 168* and the decision of the Jodhpur bench of the ITAT in *ACIT vs. Friends Engineering Works (2012) 46 (II) ITCL 440*, the ld.CIT(A) rejected the claim of additional depreciation made by the assessee.

6. Aggrieved with such order of the CIT(A), the assessee is in appeal before the tribunal.

7. The ld. counsel for the assessee strongly challenged the order of the CIT(A) in denying the claim of additional depreciation. He submitted that the genuineness of the items purchased are not in dispute. Referring to the decision of the Hon'ble Supreme Court in the case of CIT vs. Saravana Spinning Mills, 293 ITR 201, he submitted that the Hon'ble Supreme Court in the said decision has held that the manufacturing process in the textile mill was not one continuous integrated process. That each machine including the ring frame was an independent and separate machine capable of independent and specific function and, therefore, the expenditure incurred for replacement thereof would not come within the meaning of current repairs. The replacement of the ring frame constituted substitution of an old asset by a new asset and, therefore, the expenditure incurred by the assessee did not fall within the meaning of current repairs u/s 31(1) of the Act. Referring to the decision of the Hon'ble Supreme Court in the case of *CIT vs. Mir Mohammad Ali, reported in 56 ITR 165*, he submitted that where the assessee, a transport operator replaced petrol engines in two of his buses by new diesel engines, the Hon'ble Supreme Court held that the assessee was entitled to extra depreciation under the provisions of section 10(2)(via) of 1922 Act in respect of engines so replaced. He accordingly submitted that the assessee is entitled to additional depreciation and, therefore, the CIT(A) was not justified in rejecting the claim of the assessee.

8. The ld. DR, on the other hand, heavily relied on the order of the CIT(A). She submitted that if the expenses of repair and maintenance of the existing machinery are permitted, then, even the repair expenditure would be entitled to additional depreciation. She accordingly submitted that the order of the ld.CIT(A) being in accordance with law should be upheld.

9. We have considered the rival arguments advanced by both the sides and perused the orders of the Assessing Officer and the CIT(A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find, the Assessing Officer, in the instant case, disallowed additional depreciation to the tune of Rs.87,12,690/- on the ground that additional depreciation is allowable only for acquisition and installation of new plant & machinery and not for replacement of parts of plant & machinery already in existence/use. We find the ld.CIT(A) upheld the action of the Assessing Officer on the ground that the various items on which additional depreciation has been disallowed are not new machinery which has been purchased by the assessee, but, it is in the nature of repair and maintenance of existing machinery. It is the submission of the ld. counsel for the assessee that when the Assessing Officer has allowed normal depreciation on the plant & machinery which was purchased during the year, therefore, the assessee is entitled to additional depreciation on plant & machinery. We do not find any merit in the arguments advanced by the ld. counsel. The provisions of section 32(1)(iia) clearly mention that in the case of

any new machinery or plant which has been acquired and installed after the 31st day of March, 2005 by an assessee engaged in the business of manufacture or production of any article or thing, a further sum equal to 20% of the actual cost of such machinery or plant shall be allowed as deduction under clause (ii). Thus, an analysis of the aforementioned provision shows that the assessee has to by new machinery or plant and not for replacement of any part of the plant or machinery. A perusal of the list of assets on which additional depreciation has been denied by the Assessing Officer shows that these are mainly replacement of various plant & machinery earlier in use. We, therefore, do not find any infirmity in the order of the CIT(A) rejecting the claim of additional depreciation on the ground that the various items are not new machinery which has been purchased by the assessee, but, it is in the nature of repair and maintenance of the existing machinery. The grounds raised by the assessee on this issue are accordingly dismissed.

9. Grounds of appeal Nos.2 and 2.1 taken by the assessee read as under:-

> "2. The Ld. CIT(A) has erred on facts and in law, in confirming the disallowance made by the Ld. AO amounting to INR 8,75,709/- on account of reclassification of certain assets as 'Building other than Residential', eligible for depreciation at 10%, which were originally classified by the Appellant as 'Plant and Machinery', eligible for depreciation at 15%.
>
> 2.1. The Ld. CIT(A)/ Ld. AO has erred on facts and in law by not considering the detailed nature and use of the assets, while holding this disallowance."

10. Facts of the case, in brief, are that the Assessing Officer, during the course of assessment proceedings, noted that the assessee has charged higher rate of

depreciation on coal sheds and new GI sheets and, therefore, he disallowed an amount of Rs.8,75,709/- on account of excess depreciation claimed. Before the CIT(A), it was argued that the coal sheds are integral part of the manufacturing process and similarly the GI sheets upon the factory building cannot be treated as a building because it is a part of the plant. However, the ld.CIT(A) was not satisfied with the arguments advanced by the assessee and rejected the ground by observing as under:-

> "5.2 I have given careful perusal of the facts of the case. The claim of the applicant that the coal shed is part of plant and machinery is not acceptable because in a business operation of manufacturing each and every building by that logic would become plant or machinery. The godowns, warehouses, and other buildings which are utilized in ordinary manner even for housing any plant or machinery would become plant or machinery by itself. Moreover, GI sheets are such material which is utilized for making roofs of the buildings and by its nature these cannot be characterized as plant or machine. The claim of applicant under the circumstances is without any merits and is rejected. The ground of appeal is dismissed."

11. Aggrieved with the order of the CIT(A), the assessee is in appeal before the Tribunal.

12. The ld. counsel for the assessee submitted that the coal sheds should be considered as plant since these are associated with the manufacturing process. Referring to the decision of the Chadigarh Bench of the Tribunal in Shivalik Hatcheries (P) Ltd. vs. DCIT, 54 ITD 550, he submitted that poultry shed and water lines sheds of assessee doing of poultry farming are 'plant' eligible for depreciation/investment allowance. He accordingly submitted that the ld.CIT(A) is not justified in rejecting the claim of the assessee.

13. The ld. DR, on the other hand, heavily relied on the order of the CIT(A).

14. We have considered the rival arguments made by both the sides and perused the orders of the Assessing Officer and the CIT(A). We have also considered various decisions cited before us. We do not find any infirmity in the order of the CIT(A) on this issue. The coal shed and GI sheets, in our opinion, cannot be considered as plant & machinery when the assessee is engaged in manufacture of cement. We find merit in the logic given by the CIT(A) that the godowns, warehouses and other buildings which are utilized in an ordinary manner even for housing plant or machinery would not become plant or machinery by itself. Further, he has also given a finding that the GI sheets are such material which are utilized for the plant and by its nature this cannot be characterized as plant or machinery. Under these circumstances, we uphold the order of the CIT(A) and dismiss the grounds raised by the assessee on this issue.

15. Grounds of appeal Nos.3 and 3.1 raised by the assessee read as under:-

> "3. The Ld. CIT(A) has erred on facts and in law, in confirming disallowance made by the Ld. Assessing Officer amounting to INR 2,64,34,500/- (net of depreciation) on account of capitalization of 25% of Technical Know-how Fee incurred by the Appellant in the subject year, on the ground that such expenses have resulted in benefits of enduring nature to the Appellant and thereby constitutes a capital asset.
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> 3.1 The Ld. CIT(A)/Ld.AO have erred on facts and in law in not appreciating that the Technical Know-how has been utilized for smooth running of the business of the Appellant and has not lead to acquisition of any new capital asset."

16. Facts of the case, in brief, are that the Assessing Officer, during the course of assessment proceedings noted that the assessee has claimed expenses of technical know-how fee during the year to the tune of Rs.14,09,84,000/-. This fee was paid to a foreign company M/s Heidelberg Cement Asia Pte Ltd. (HCA) in lieu of technical knowhow assistance from them. The assessee has debited the above amount as revenue expenditure. According to the Assessing Officer, this gives rise to benefit/advantage which is enduring in nature. He, therefore, asked the assessee to explain as to why the claim should not be allowed as a capital expenditure and not as a revenue expenditure. It was explained by the assessee that the expenditure was incurred by the assessee for technical information and assistance provided by HCA in relation to various services that were to be rendered by them. It was submitted that HCA has been consistently providing technical knowhow support to the assessee from which various benefits accrued to the assessee. Therefore, the assessee has correctly claimed the aforesaid amount as revenue expenditure. Since the same has been incurred for facilitating the manufacturing and trading operation of the assessee and it neither has acquired any asset of enduring nature nor has paid any capital amount for the same since the amount paid is a percentage linked with the sales affected with it. Various decisions were also brought to the notice of the Assessing Officer. However, the Assessing Officer was not satisfied with the arguments advanced by the assessee. He analysed the scope (clause 1) of the said agreement. He reproduced the scope (clause 1) of the agreement which reads as under:-

"The purpose of this Agreement is to provide the basis for providing technology for use with the view to achieving a high technical level of production and sale of cement and cement related products by the MCL by way of systematic provision of know-how from HCA to MCL, from time to time."

17. Further, as per clause 2 (provision of know-how by HCA) of the agreement, the assessee was to receive technical know-how including designs, formulae, charts, drawings, calculation sheets, standards and other information and knowledge relating to the manufacturing technology of the products, apart from the following benefits:-

i) Improvement in all technical processes right from extraction of raw material to manufacture of end products.

ii) Providing technical know how relating to manufacturing activity/processes.

iii) Putting into place systems related to enhanced quality of and product development.

iv) Enhanced safety measures.

v) Upgradation in plant efficiency through modern and latest technology.

vi) Skill upgradation through training programmes of employees, both on the job and through dedicated workshops.

vii) Analyses and laboratory tests to upgrade and optimize processes.

18. Therefore, he noted that the acquisition of technical know-how seeks to improve each and every aspect of the entire business. The acquisition of technical know-how has brought in a complete and comprehensive overhauling of the entire business of the assessee. Relying on various decisions, the Assessing Officer held that 25% of the total technical know-how expenses of Rs.14,09,84,000/- which comes to Rs.3,52,46,000/- has to be treated as capital expenditure being spent towards acquisition of capital asset as it gives rise to enduring benefit which can be enjoyed by the assessee over a number of years. He, therefore, allowed depreciation on the above amounting to Rs.88,11,500/- and made addition of Rs.2,64,34,500/- to the total income of the assessee. In appeal, the ld.CIT(A) upheld the action of the Assessing Officer.

19. Aggrieved with such order of the CIT(A), the assessee is in appeal.

20. The ld. counsel for the assessee strongly challenged the order of the CIT(A) upholding the order of the Assessing Officer. He submitted that the assessee was not a subsidiary of foreign company nor it is a case of diversion of any profit. Referring to the decision of the Hon'ble Delhi High Court in the case of *CIT vs. Hero Honda Motors Ltd., 55 taxmann.com 230 (Delhi)*, he submitted that the Hon'ble High Court in the said decision has held that where the assessee is engaged in manufacturing and selling of motorcycles, made payment of royalty to a foreign company for merely acquiring right to use technical know-how whereas ownership and intellectual property rights in know-how remained with the foreign company,

payment in question was to be allowed as business expenditure. Referring to the decision of the Hon'ble Delhi High Court in the case of *CIT vs G4S Securities System (India) P. Ltd., 338 ITR 46 (Del),* he submitted that the Hon'ble High Court in the said decision has held that the royalty paid by the assessee to foreign company for use of technical know-how on year to year basis would be allowable as revenue expenditure. Referring to the decision of the Hon'ble Allahabad High Court in the case of *CIT vs. UPCOM Cables Ltd., reported in (2017) 78 taxmann.com 235 (All),* he submitted that the Hon'ble High Court in the said decision has held that where the assessee acquired technical know-how from foreign company and paid technical know how fees as well as 2 per cent royalty on selling price of manufactured licensed product, such royalty payment was to be treated as revenue expenditure. He submitted that in the instant case, the technical know-how agreement has independent clauses under which each and every tangible know-how has to be returned back to the owner. He submitted that the payment as per the above agreement has been made for achieving improvement in all technical processes. The technical information and assistance relates to improving of process of manufacturing. As per the terms of the agreement, the HC Asia has agreed to provide know-how relating to manufacturing technology related to quality and product development. The arrangement with HC Asia for providing technical know-how majorly covers providing information on various parameters involved in manufacturing process of the assessee such as fuel mix, manner and process of undertaking the production, necessary safety measures to be ensured for

securing a quality product which would be accepted by the Indian market, etc. Thus, the payment made for improving the quality of the product being manufactured and not to introduce any new line of product and since the technical information and assistance relates to the improving the process of manufacturing, therefore, the said amount is revenue in nature and, therefore, the ld.CIT(A) is not justified in upholding the action of the Assessing Officer by treating 25% of such payment as capital in nature and thereby allowing only depreciation on the same.

21. The ld. DR, on the other hand, heavily relied on the order of the CIT(A). She submitted that the benefit received by the assessee on account of such payment amounts to enduring benefit beyond the terms of the agreement. Referring to the decision of the Hon'ble Supreme Court in the case of Southern Switch Gear Ltd., 232 ITR 359, she submitted that in that case the assessee has entered into a collaboration agreement for providing for technical know-how for setting up of a factory and operation thereof. The foreign company agreed not to manufacture products in India and given right to a third person to do the same. Referring to the clauses of the agreement, it was held that the technical know-how so acquired resulted in enduring advantage and benefit and that the same was available to the assessee for its manufacturing and industrial processes even after termination of the agreement. Since the factory and its operation would have been continued, though the duration of the agreement was five years, but, the assessee even after the expiry of the period, could use the methods of production, procedure,

experiments', improvements which had been made available to them in pursuance of the agreement, and, therefore, an enduring benefit/advantage was acquired. She also submitted that the manufacture and sale was an independent right secured and was of an enduring nature. Accordingly, 25% of the royalty paid was disallowed as capital expenditure. The decision of the Hon'ble Madras High Court was upheld by the Hon'ble Supreme Court. She submitted that in the present case also the payment made by the assessee was for acquiring benefit of enduring nature even after the expiry of the agreement. The assessee company is into manufacturing of cement and all the technologies given to it for the process of manufacturing get merged into its business process. The business line of the assessee is of a particular nature which would require updating every day like software industry or manufacturing of highly sophisticated instruments. She submitted that the argument of the assessee that it would return all the tangible know-how to the owner appears worth paper argument only because in a cement manufacturing the changes are peripheral. She accordingly submitted that since the ld.CIT(A) has passed the order by relying on various decisions and on the basis of the facts of the present case, therefore, the same should be upheld and the grounds raised by the assessee should be dismissed.

22. We have heard the arguments made by both the sides, perused the orders of the Assessing Officer and CIT(A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find

the Assessing Officer, in the instant case, disallowed 25% of the total technical know-how expenses of Rs.14,09,84,000/- which comes to Rs.3,52,46,000/- treating the same as capital expenditure being spent towards acquisition of capital asset as it gives rise to enduring benefit which can be enjoyed by the assessee over a number of years. He accordingly allowed depreciation on this @ 25% amounting to Rs.88,11,500/- and made an addition of Rs.2,64,34,500/- to the total income of the assessee. While doing so, the Assessing Officer held that the scope read with the provisions of technical know-how clearly indicate that the acquisition of technical know-how seeks to improve each and every aspect of the entire business. The agreement between the assessee and the HCA shows that the acquisition of technical know-how has brought in a complete and comprehensive overhauling of the entire business of the assessee. Therefore, the agreement clearly indicates that the technical knowledge the assessee obtained from this agreement with HCA secured to the assessee an enduring advantage and though benefit which was available to the assessee for its manufacturing and industrial process even after the termination of agreement ceases, but, when the agreement never terminates on account of revision/automatic renewal the benefit goes on and on. Further, continuous use of improved practices over several years leads to creation of institutional memory of advanced procedures and techniques. The Assessing Officer further noted that due to latent learning of systematic procedures and techniques through periodic training of personnel in the form of workshops and on the job trainings continues to reap benefits to the assessee way beyond periods

confined with the agreement. According to him, the trained manpower continues to perform at higher levels of efficiency with better techniques even if the technical know-how agreement was to terminate. We find the ld.CIT(A) while upholding the action of the Assessing Officer noted that the payment made by the assessee has bestowed benefits of enduring nature which would not get terminated with the expiry of the agreement. According to him, when the assessee company is into manufacturing of cement and all the technologies given to it for manufacturing of cement would get merged into its business process. The business line of the assessee is of a particular nature which would require updating everyday like software industry or manufacturing of highly sophisticated instruments. The argument of the assessee that it would return all the designs according to him appears worth paper argument only because in a cement manufacturing plant, if the designs have been used for making the business process the changes are irreversible. It is the submission of the ld. counsel that the assessee has to continuously upgrade plant efficiency by employing modern and latest techniques to reduce costs and improve its productivity and quality. The expenditure on technical know-how was incurred by the assessee for technical information and assistance provided by HCA for the various services that were to be rendered by HCA to the assessee. It is also his submission that the benefit of the technical know-how does vest once and for all thereby resulting in an enduring benefit or for the purposes of bringing into existence any asset or advantage of an enduring nature, rather, the object of the technical assistance was for running the business

effectively and profitably. Further, it is also his submission that the payment comprising 2% of sales as fee for technical know-how is recurrent depending on sales and pertains only to the period of agreement. We find some force in the above argument of the ld. counsel for the assessee. We find, clause 2.2 of the agreement reads as under:-

> "2.2 All the Technical Information supplied by HCA (whether in writing or orally or in any other manner) mention in para 2.1 above for use by MCL and all copies of the Technical Information (or any of it) made by the MCL shall be and remain the property of HCA and MCL acknowledges the copyright in the Technical Information shall belong to an remain vested with HCA. HCA hereby grants to MCL licence to make such number of copies of the Technical Information (or any part thereof) as the MCL may reasonably require for the purposes of Agreement."

22.1 We find clause 5 of the agreement reads as under:-

> "Technical know-how fee in respect of each quarter of a year equal to 2% on the basis of the net ex-factory price of the produce exclusive of excise duties minus the cost of standard bought-out components and landed cost of imported components, irrespective of the source of procurement, including ocean freight, insurance, custom duties and net of distribution costs (fright and forwarding) etc. and as shown in the unaudited/audited financial accounts of MCI."

22.2 Similarly, clause 13 of the agreement reads as under:-

> "13.1 Upon the expiration of the term or earlier termination of this Agreement, MCL shall:
>
> 13.1.1 at its own cost promptly return to HCA, or otherwise dispose of as HCA may instruct, all Technical Documentation and all other documentation and papers supplied by MCL by HCA and all copies thereof and notes and extracts taken there from by MCL, and
>
> 13.1.2 destroy all catalogues, advertising and promotional material, stationery and materials of any sort relating to the products…."

23. We find somewhat similar issue had come up before the Hon'ble Delhi High Court in the case of CIT vs. Hero Honda Motors Ltd. (supra). In that case: the assessee was a joint venture between the Hero Group and Honda, Japan, for manufacture and sale of motorcycle using technology licenced by Honda; the assessee and Honda thereupon entered into an agreement called 'licence and technical assistance agreement' in terms which assessee paid royalty to the Honda; the assessee claimed deduction of said payment under section 37(1). The Assessing Officer rejected assessee's claim holding that it was in the nature of capital expenditure; and the Tribunal, however, allowed assessee's claim on revenue's appeal.

24. On appeal filed by the Revenue, the Hon'ble High Court held as under:-

> "14. What is placed before us is the "licence and technical assistance agreement" dated 2nd June, 1995 for the territory of India. The term 'intellectual property right' stood defined to mean those patents, utility models, design patents and other intellectual property rights relating directly to the products or the licensed parts thereof or to manufacturing of the products and their licensed parts, but excluded trademarks, patents, utility models, design patents and intellectual property rights relating to the manufacturing facilities and the manufacture thereof. The term 'know-how' was defined as any or all secret, technical information except for intellectual property rights, whether in writing or not, including but not limited to drawings, standards, specifications, material list, process manuals and direction maps etc. directly related to products or licensed parts thereof, or necessary for manufacture of the same. The term 'technical information' was to mean 'know-how' and any technical information not included in 'know-how' which related to the product or licensed part or was necessary for manufacture of product or licensed parts which the Honda owned at the time of execution of the agreement or would own from time to time during the subsistence of the agreement. The term 'products' meant two-wheelers or three-wheelers as expressly specified under clauses (a) and (b), identified by licensor's development codes, viz. 198s, KCCA, etc. which had already been developed and was under manufacture under the earlier agreement. Under clause (c), it would include additional

models or types of two/three wheelers pursuant to 'model change' as specified in the model agreement. The term 'new models' was to mean new models developed by Honda at the request of the respondent assessee with new development code and subject to new model agreement. Similarly, the term 'model change' was defined as conduct through which a new model with new development code was made by a change in any part or entirety of the product, including but not limited to appearance, structure, characteristics or specifications and in each case was subject to a new model agreement. The agreement specifically recorded that the respondent assessee was already engaged in the business of manufacturing, assembling, selling and otherwise dealing with two/three wheelers and their parts as a joint venture. It referred to the earlier collaboration agreement dated 24th January, 1984 and the subsequent amendment thereto which conferred and had granted to the respondent assessee a right and licence to manufacture, assemble, sell, distribute, repair and service two/three wheelers.

15. The other terms of the agreement were:

(1) Rights and licenses granted by the licensor to the respondent assessee were exclusive, indivisible and non-transferrable, without the right to grant sub-licenses to manufacture, assemble, sell and distribute the product or parts thereof. The rights and duties under the agreement were not assignable or delegatable, directly or indirectly.

(2) The aforesaid license was for the term of the agreement, i.e. 10 years from the effective date of 21st June, 1994.

(3) The Agreement could be terminated by 60 days' notice to the defaulting party, if it failed to cure the same within the notice period. The agreement could also be terminated forthwith by a party, if the other party had transferred whole or an important part of business; went into liquidation, bankruptcy or insolvency; merged with, or was directly or indirectly transferred to third party; or on significant change in shareholding ownership.

(4) Upon expiration of the term of the agreement, i.e. after 10 years, or termination due to default of performance of obligations, the respondent assessee could continue to manufacture, assemble, sell or deliver services but subject to due performance of their obligations, including payment of royalty.

(5) In the event of pre-mature termination, i.e. within 10 years, except due to default of performance of obligations, the respondent assessee was to promptly discontinue manufacturing activities, sale and other dispositions of the products and the

parts, as well as the use of intellectual property right and technical information.

(6) Further in the event of expiration or termination, the respondent was to promptly return all documents and tangible properties in connection with the agreement including copies and translations and all information received under the secret and confidentiality clauses.

(7) Honda had right to access the respondent's factories and other facilities for inspections to check and confirm whether conditions/obligations imposed were being complied with.

(8) Knowhow, technical information and other non-public technical or business information was to remain solely and exclusively the property of Honda and was to be held in trust and in confidence for Honda by the respondent assessee. This information was not to be divulged, communicated or made known to third persons in any manner whatsoever, except as expressly provided. Respondent was to take all necessary precautions to keep the said information secret and confidential and restrict its use strictly as per the first as well as the present agreement. The respondent assessee was to establish and maintain internal regulations and procedures for protection of secrecy. The information could be disclosed to employees, Directors or approved sub-contractors when it was reasonably necessary for the purpose of manufacture, assembly, repair and servicing, subject to obtaining a 'written promise' from the approved sub-contractors to treat all information as secret and confidential.

(9) The aforesaid rights and obligations were to persist even on expiration or termination of the agreement.

(10) The respondent assessee was not to use or cause or permit use by any third party, intellectual property right or technical information provided under the agreement.

(11) The respondent assessee was not to claim any title or property right whatsoever during the existence of the agreement. Upon termination as a result of default of the respondent assessee, no such right, title, property or interest whatsoever could be claimed.

(12) There were stipulations in case respondent assessee became aware or had knowledge of any infringement or illegal use of intellectual property right of Honda in India by a third party.

(13) The respondent was to submit monthly written report in the designated form to Honda regarding manufacture, sale and inventory and/or sale of parts or products. Honda was entitled to have access to books of accounts, financial statements and records, to the extent they relate to transactions as contemplated under the agreement.

(14) The respondent could not, without Honda's prior written consent, directly or indirectly or through its subsidiary, affiliate, distributor or agent or any other party, carry on or participate in the business of manufacturing, assembling, distributing or otherwise dealing in two/three wheelers of other parties.

(15) On the question of consideration payable, Article 25 of the Agreement provided for fees under two heads namely, (1) Model Fee; and, (2) Running Royalty.

a. 'Model fee' was payable on model change under the new model agreement. It was non-refundable and non-creditable against other payments. The agreement in addition stipulated the amount of model fee payable in respect of the product, "C-100" of US$ 10,00,000/- was payable in three equal instalments; i.e., (i) within first 60 days of the agreement being taken on record by the Government authorities in India; (ii) within 60 days of Honda delivering to the respondent the technical information necessary for manufacture and assembly; and, (iii) within 60 days after the parties confirmed in writing that the manufacture of the model had commenced on commercial basis, or 4 years after the agreement, whichever was earlier.

b. Royalty was running and periodical payment as specified in Exhibit 1 or the amounts calculated by multiplying the rate specified in Exhibit 1 with reference to the ex-factory/ex-warehouse sales price.

16. Reading the aforesaid terms and conditions and applying the tests expounded, it has to be held that the payments in question were for right to use or rather for access to technical knowhow and information. The ownership and the intellectual property rights in the knowhow or technical information were never transferred or became an asset of the respondent assessee. The ownership rights were ardently and vigorously protected by Honda. The proprietorship in the intellectual property was not conveyed to the respondent assessee but only a limited and restricted right to use on strict and stringent terms were granted. The ownership in the intangible continued to remain the exclusive and sole property of Honda. The information, etc. were made

available to the respondent assessee for day to day running and operation, i.e. to carry on business. In fact, the business was not exactly new. Manufacture and sales had already commenced under the agreement dated 24th January, 1984. After expiry of the first agreement, the second agreement dated 2nd June, 1995, ensured continuity in manufacture, development, production and sale. The period of agreement, 10 years in the present case, would be inconsequential for the agreement merely permitted and allowed use of technology subject to payment of royalty and compliances and the proprietorship and ownership right was never granted or transferred. The factum that after 10 years and after returning the tangible properties, the respondent assessee could still have continued to use technical knowhow and information would be a trivial and inconsequential factum as in the automobile industry, technology upgradation is constant and rapid. Gone are the days when one or two manufacturers enjoyed monopoly rights and there was a long and indeterminate wait and queue for purchase of out-of-date models. Technical upgradation and state-of-the-art know-how is injected every year in the automobile industry. Failure to keep up and upgrade would result in product rejection and fall in sales. Persistent upgradation and cutting edge technology is mandate and business requirement in the competitive market of two/three wheelers."

25. We find the Hon'ble Delhi High Curt in the case of CIT vs. G4S Securities System (India) P. Ltd. (supra), has observed as under:-

"9. From the terms of the agreement it is noticed that this arrangement was for a period of 5 years, which may be extended by another period of 5 years unless either party gives 6 months notice to the other party prior to the end of such 5 years period. The payment of commission @ 1% was based on the net sales and not lumpsum. On the termination of expiration of the sub license agreement, the assessee was to return all G4F knowhow obtained pursuant to the said agreement. Not only that, the assessee was not even entitled to make use of the trade mark name or G4F knowhow and was forthwith to change its' corporate and/or trade names. All rights and knowhow, therefore, continued to vest in G4F and it was only the right to use the knowhow that was made available to the assessee and that too based on its net sales. That means all the royalty paid in the shape of 1 % of net sales for the use of trade mark and right to use knowhow could not be considered to be of enduring nature and thus capital expenditure. The expenditure was to be of revenue nature. In the case of Jonas Wood Head and Sons Vs. CIT, 117 ITR 55, it was held that the question regarding capital or revenue expenditure depends on the terms of agreement in each case. In the case of CIT Vs. Gujarat Carbon Ltd., 254 ITR 294, it was held that the payment of revenue under the agreement was directly relatable to services which were in the revenue field and were allowable as revenue expenditure. In the case of Goodyear (I) Ltd. Vs. ITO 73 ITD

189(Delhi), the assessee had not acquired ownership right of technical knowhow but transfer of use of licenses. There was no advantage of enduring nature and hence it was held to be a case of revenue expenditure. In the case of Travancore Sugar and Chemicals Ltd. 62 ITR 566 (SC) it was held that whenever a payment is based on a percentage of turnover or profits, it necessarily has no relation to the capital value of the asset, because it cannot be known at the time of the agreement what the turnover or profits will be over a period of years. In another case reported as DCIT Vs. Swaraj Engines Ltd. (2002) 124 Taxman 188, the Tribunal held, revenue payment is allowable as revenue expenditure, since it is related to sales and that it is paid for better conduct, efficiency and improvement of the existing business or product manufactured by the assessee. In the case of CIT Vs. Lumax Industries Ltd. (2008) 173 Taxman 290 (Delhi), this Court has also held that the payment of license fee on year to year basis for acquisition of technical knowledge would not amount to capital expenditure, but the revenue expenditure.

10. From the ratio of the above said cases, we are of the considered view that under the terms of the agreement as noted above, the ownership rights of the trade mark and knowhow throughout vested with G4F and on the expiration or termination of the agreement the assessee was to return all G4F knowhow obtained by it under the agreement. The payment of royalty was also to be on year to year basis on the net sales of the assessee and at no point of time the assessee was entitled to become the exclusive owner of the technical knowhow and the trade mark. Hence, the expenditure incurred by the assessee as royalty is revenue expenditure and is therefore, relatable under Section 37(1) of the Act. We thus, answer the question in favour of the Assessee and against the Revenue and consequently dismiss all the three appeals."

26. We find the Hon'ble Allahabad High Court in the case of CIT vs. UPCOM Cables Ltd. (supra) has observed as under:-

"35. The question as to whether a particular payment made towards technical know-how fee or royalty to a Foreign Company in lieu of an Agreement will be a "capital expenditure" or "revenue expenditure" would depend upon facts of individual case, and, in particular, various terms of Agreement involved therein.

36. In the present case, a concurrent finding has been recorded by CIT(A) and Tribunal both that on termination of Agreement, which was for a period of five years, Assessee would return all relevant material relating to know-how acquired through Agreement. This is one of the relevant consideration observed in Alembic Chemical works Ltd. (supra) to hold that in such a case, payment towards 'Royalty' would be 'Revenue expenditure' and not 'Capital'.

> The agreement also shows that it was not an exclusive right available to the Assessee, inasmuch in para 13 of Annexure, of foreign collaboration, approval accorded by Government of India provides that in case item of manufacture is one which is patented in India, payment of 'Royalty'/lump sum made by Indian Company to Foreign collaborator, during period of agreement shall constitute full compensation for use of patent right till expiry of life of patent and Indian Company shall be free to manufacture that item even after expiry of the collaboration agreement without making any additional payments. Assessee claimed that royalty payment is part of percentage of selling price of product and not for acquiring technical know-how of manufactured licensed product having enduring benefit. These facts available on record have not been disputed and we have not been shown any authority so as to justify to take a different view than what has been taken by Tribunal.
>
> 37. In view thereof, we answer both the aforesaid questions against Revenue and in favour of Assessee and confirm the view taken by Tribunal on all these aspects."

27. Respectfully following the decisions cited, supra, we hold that the ld.CIT(A) is not justified in upholding the action of the Assessing Officer in treating 25% of the technical know-how fees as capital in nature. We, therefore, set aside the order of the CIT(A) on this issue and direct the Assessing Officer to treat the entire amount as revenue in nature. The grounds raised by the assessee on this issue are accordingly allowed.

28. Ground of appeal No.4 relating to levy of interest u/s 234A being mandatory and consequential in nature is dismissed.

29. Ground of appeal No.5 being premature at this juncture is dismissed.

30. In the result, the appeal filed by the assessee is partly allowed.

The decision was pronounced in the open court on 31.10.2019.

(SUCHITRA KAMBLE) JUDICIAL MEMBER	(R.K. PANDA) ACCOUNTANT MEMBER

Dated: October, 2019

dk

Copy forwarded to :

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asstt. Registrar, ITAT, New Delhi